

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 MICHELLE C. ZEITER, individually and as
4 Special Administrator for the Estate of
5 Michael Buchna, and JENNIFER C. BEAM,
6 individually and as Special Administrator for
7 the Estate of Michael Buchna,

8 Plaintiffs

9 v.

10 WALMART INC. and WALMART
11 STORES, INC.,

12 Defendants

Case No.: 2:21-cv-00061-APG-DJA

**Order Regarding ESI and Attorneys
Testifying at the Evidentiary Hearing**

13 This case is set for an evidentiary hearing on the plaintiffs' motion to strike the
14 defendants' answer on grounds of spoliation and discovery misconduct. ECF Nos. 118; 142. I
15 directed the parties to file briefs addressing whether Walmart's surveillance video is
16 electronically stored information (ESI) under Federal Rule of Civil Procedure 37(e) because that
17 impacts the legal standards that apply to my sanctions analysis. ECF No. 142. Having reviewed
18 the parties' cross briefs on this issue, I conclude that the video surveillance evidence is ESI
19 because even if a CD-ROM containing a video is tangible evidence as the plaintiffs contend,
20 there is no evidence that Walmart downloaded the video of this incident to a CD-ROM before it
21 was overwritten on Walmart's system.

22 I also allowed the parties to file motions regarding whether opposing counsel may be
23 called as witnesses at the evidentiary hearing. *Id.* I deny the plaintiffs' request to call former
Walmart attorney Matthew Beckstead as a witness at the evidentiary hearing because the
plaintiffs have not identified any basis to call him that would overcome the attorney-client
privilege. But I grant the plaintiffs' request to call former Walmart attorney Timothy Kuhls as a

1 witness because fairness dictates allowing the plaintiffs to question Kuhls where Walmart has
2 waived its attorney-client privilege by relying on Kuhls' declaration in support of its opposition
3 to the plaintiffs' motion to strike Walmart's answer.

4 **A. ESI**

5 The parties dispute whether Walmart's surveillance video, which Walmart did not
6 preserve, is ESI for purposes of sanctions under Rule 37(e), or is also tangible evidence for
7 purposes of sanctions under my inherent power. The plaintiffs concede that Walmart's video
8 surveillance, which tapes over itself every 30 to 45 days, is ESI. *See* ECF No. 145 at 2 (stating
9 that Walmart "operate[s] surveillance video cameras that digitally record its premises. This
10 digital information constitutes 'electronically stored information, i.e., 'ESI'."). However, the
11 plaintiffs contend that the surveillance video is also tangible evidence because when an incident
12 occurs at a Walmart store, Walmart's policy was to download the video to a physical CD-ROM
13 that would then be mailed to Walmart's claims division.

14 However, there is no evidence that Walmart ever downloaded video of the incident at
15 issue to a CD-ROM. To the contrary, the evidence has been that Walmart did nothing to
16 preserve the video. Because the plaintiffs have not presented evidence that a CD-ROM ever
17 existed, they cannot show Walmart spoliated evidence by losing or destroying it. *See McCabe v.*
18 *Wal-Mart Stores, Inc.*, No. 2:14-cv-01987-JAD-CWH, 2016 WL 706191, at *2 (D. Nev. Feb. 22,
19 2016) ("Before a court will sanction a party for spoliation of relevant evidence, however, the
20 moving party must demonstrate that relevant evidence existed."). Consequently, for purposes of
21 determining potential sanctions against Walmart for failing to preserve the video, the video
22 surveillance is ESI.¹

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¹ I therefore need not address Walmart's argument that video on a CD-ROM is also ESI.

B. Attorney Testimony

The plaintiffs seek to compel former Walmart attorneys Beckstead and Kuhls to testify at the evidentiary hearing. ECF No. 144. The plaintiffs argue that Walmart's former lawyers have factual knowledge about Walmart's obstructive discovery conduct in this case. The plaintiffs also contend that Walmart supported its response to the motion to strike with an affidavit from Kuhls even though it previously objected to the plaintiffs deposing Kuhls about his investigation into witnesses who may have observed the incident at issue in this case. The plaintiffs assert that they do not seek Beckstead's or Kuhls' mental impressions or legal advice; rather they seek facts regarding the attorneys' diligence on Walmart's behalf in identifying witnesses and documents, as well as why certain information was not timely produced when ordered.

Walmart responds that Beckstead and Kuhls should not be compelled to testify because they are bound by the attorney-client privilege. It argues that the plaintiffs have not met their burden to show the attorneys' testimony is needed, relevant and nonprivileged, and crucial to the preparation of the plaintiffs' case.

Under Federal Rule of Evidence 501, state law governs privilege in a civil case like this where the claims arise under state law. Under Nevada law, the "attorney-client privilege is a long-standing privilege at common law that protects communications between attorneys and clients." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 399 P.3d 334, 341 (Nev. 2017) (en banc). In light of this privilege, forcing an opposing party's counsel to give testimony as a witness "has long been discouraged and recognized as disrupting the adversarial nature of our judicial system." *Club Vista Fin. Servs. v. Dist. Ct.*, 276 P.3d 246, 249 (Nev. 2012) (en banc) (quotation omitted). Thus, allowing a party to take the deposition of an opposing party's attorney is "disfavored." *Id.* at 250 (quotation omitted).

1 However, a court may allow it if the party seeking the attorney’s testimony shows that
2 “(1) no other means exist to obtain the information than to depose opposing counsel; (2) the
3 information sought is relevant and nonprivileged; and (3) the information is crucial to the
4 preparation of the case.” *Id.* (quotation omitted). “In evaluating these three factors, [I] should
5 consider whether the attorney is a percipient witness to the facts giving rise to the complaint.” *Id.*
6 (internal footnote omitted). In the limited circumstances when I allow an opposing attorney to be
7 questioned, I “should provide specific limiting instructions to ensure that the parties avoid
8 improper disclosure of protected information.” *Id.*

9 1. Beckstead

10 The plaintiffs do not attempt to meet the three-part *Club Vista* test to show why
11 Beckstead’s testimony is necessary at the evidentiary hearing. Although they point to
12 Beckstead’s litigation conduct in support of why Walmart should be sanctioned, Walmart’s
13 failure to comply with court orders is reflected on the court’s record. Because Beckstead was
14 Walmart’s attorney, Walmart is responsible for his conduct. *Dezzani v. Kern & Assocs., Ltd.*, 412
15 P.3d 56, 61 (Nev. 2018) (en banc); *Wehrheim v. State*, 443 P.2d 607, 608 (Nev. 1968) (“A party
16 is bound by the acts of his attorney in the management of his case.”). I therefore deny the
17 plaintiffs’ request to call Beckstead as a witness. However, I caution Walmart that if it attempts
18 to explain away its litigation conduct as the unauthorized actions of rogue counsel, it may waive
19 the privilege and open the door to explore those contentions. *See United States v. Sanmina Corp.*,
20 968 F.3d 1107, 1117 (9th Cir. 2020) (noting that a party may impliedly waive the attorney-client
21 privilege “by putting the lawyer’s performance at issue during the course of litigation” (quotation
22 omitted)).

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1 2. Kuhls

2 Walmart offered Kuhls' declaration in support of its opposition to the plaintiffs' motion
3 to strike Walmart's answer. ECF No. 122-1. In that declaration, Kuhls states that he "worked
4 with Walmart to create responses" to interrogatories, that he "personally met with" the store's
5 personnel manager, and they "interviewed all Walmart employees that were clocked in" on the
6 day of the incident "who were still employed by Walmart at the time [Walmart was] answering
7 the written discovery." *Id.* at 2. He states that this investigation "was the basis" for Walmart's
8 discovery response that no Walmart employee remembered the incident. *Id.* Kuhls states he and
9 the personnel manager "did not contact any former employees." *Id.*

10 Neither party has addressed whether Walmart waived its attorney-client privilege as to
11 the matters addressed in Kuhls' declaration, even though I raised that possibility at the December
12 2023 hearing. Under Federal Rule of Evidence 502(a), when a party discloses attorney-client
13 information in a federal proceeding and thereby waives the attorney-client privilege, "the waiver
14 extends to an undisclosed communication or information in a federal or state proceeding only if:
15 (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information
16 concern the same subject matter; and (3) they ought in fairness to be considered together." In
17 contrast, a disclosure does not operate as a waiver if it was (1) inadvertent, (2) the privilege
18 holder "took reasonable steps to prevent disclosure," and (3) the privilege holder "promptly took
19 reasonable steps to rectify the error." Fed. R. Evid. 502(b). As the party asserting the privilege,
20 Walmart bears the burden of proving that it has not waived the privilege. *Weil v. Inv./Indicators,*
21 *Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981).

22 Walmart has not met its burden of showing it did not waive the privilege relating to
23 Kuhls' declaration because it has not attempted to make any showing on that matter. Walmart

1 has at least impliedly, if not expressly, waived its privilege by submitting the Kuhls declaration
2 in support of its defense against sanctions. *See Sanmina Corp.*, 968 F.3d at 1117. The waiver
3 was intentional because Walmart supplied the declaration and relied on it to oppose the motion
4 to strike. Despite my previously mentioning the possibility that Walmart waived the privilege,
5 Walmart again attached Kuhls' declaration to its brief on whether Kuhls should be compelled to
6 testify at the evidentiary hearing. ECF No. 143-9. Walmart has taken no action to withdraw the
7 disclosure. The declaration concerns what Kuhls did and did not do in investigating and
8 responding to the plaintiffs' discovery request, which is the same subject matter that the
9 plaintiffs seek in examining Kuhls. In fairness, the plaintiffs should be able to examine Kuhls on
10 this matter because Walmart is relying on Kuhls' representations to support its position that it
11 should not be sanctioned. *See Sanmina Corp.*, 968 F.3d at 1117 (stating that "fairness . . .
12 animates the concept of subject matter waiver, in which voluntary disclosure of the content of a
13 privileged attorney communication constitutes waiver of the privilege as to all other such
14 communications on the same subject" (quotation omitted)). Walmart may not use the attorney-
15 client privilege "both as a sword and shield." *Rock River Commc'ns, Inc. v. Universal Music*
16 *Grp., Inc.*, 745 F.3d 343, 353 (9th Cir. 2014) (quotation omitted). Consequently, Walmart has
17 waived the attorney-client privilege regarding Kuhls' investigation to respond to the second set
18 of interrogatories, and the plaintiffs should be able to question him on that.

19 Allowing the plaintiffs to question Kuhls at the evidentiary hearing comports with the
20 *Club Vista* factors. First, the plaintiffs have no other means to obtain the information than to
21 question Kuhls. Although Kuhls mentions an unidentified Walmart personnel manager who may
22 have some insight on the issue, only Kuhls knows what he did to locate all relevant Walmart
23 employees and ascertain their knowledge in order to respond to the discovery requests. The

1 information sought is relevant and nonprivileged because the inquiry for the evidentiary hearing
2 involves Walmart's litigation conduct and what sanctions, if any, to impose. As discussed
3 above, Walmart has waived its privilege on this issue by repeatedly submitting and relying on
4 Kuhls' declaration. Finally, the information is crucial to the preparation of the evidentiary
5 hearing. Although Walmart contends Kuhls knows nothing of the underlying incident, the
6 evidentiary hearing on sanctions will not address merits of the case.

7 I therefore will allow the plaintiffs to call Kuhls as a witness at the evidentiary hearing.
8 Consistent with *Club Vista*, I provide the specific limiting instruction that the privilege is waived
9 only with respect to Kuhls' investigation outlined in his declaration that he conducted to respond
10 to the plaintiffs' second set of interrogatories.² This ruling does not give the plaintiffs free reign
11 to question Kuhls on the entirety of his representation of Walmart or any other acts he took or
12 omitted in representing Walmart. *Id.* (stating that "disclosure of information resulting in the
13 waiver of the attorney-client privilege constitutes waiver only as to communications about the
14 matter actually disclosed" (quotation omitted)).

15 C. Conclusion

16 I THEREFORE ORDER that for purposes of the evidentiary hearing on sanctions,
17 Walmart's surveillance video is deemed electronically stored information.

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22 ² The defendants stated in a status report that they wanted to call the plaintiffs' attorneys at the
23 evidentiary hearing. *See* ECF No. 141 at 3. However, Walmart did not file a brief in support.
Additionally, the plaintiffs' attorneys would not have any information on Kuhls' investigation, so
there is no need to call them for completeness purposes. The plaintiffs' attorneys therefore will
not be called as witnesses at the hearing.

1 I FURTHER ORDER that the plaintiffs may not call former Walmart attorney Matthew
2 Beckstead as a witness at the evidentiary hearing, but they may call former Walmart attorney
3 Timothy Kuhls as outlined in this order.

4 DATED this 29th day of April, 2024.



ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE